

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 353 Drug Screening of Potential and Existing Beneficiaries of Temporary Cash Assistance

**SPONSOR(S):** Health & Human Services Access Subcommittee; Smith

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	12 Y, 3 N, As CS	Batchelor	Schoolfield
2) Rulemaking & Regulation Subcommittee		Miller	Rubottom
3) Judiciary Committee			
4) Health Care Appropriations Subcommittee			
5) Health & Human Services Committee			

### SUMMARY ANALYSIS

The bill creates s. 414.0652, F.S., establishing that the Department of Children and Families (DCF) shall create a drug screening program for temporary cash assistance applicants or recipients as a condition of eligibility. The bill provides the following:

- Applicants or recipients who have been convicted of a drug felony in the previous 3 years shall be drug screened and upon receiving cash assistance the individual will be screened at least annually for an additional 3 years.
- Applicants or recipients who fail the drug screen and either refuses to take or tests positive in a follow-up confirmation test shall be disqualified from receiving temporary cash assistance for 3 years. However, DCF may designate another individual to receive the cash assistance benefits on behalf of a minor child.
- The methods of drug screening and confirmatory testing, including policies and procedures for specimen collection, testing, storage and transportation are detailed in the bill. DCF is required to approve laboratories to perform the tests, establish standards for drug screening, and adopt protocols, policies, and procedures for drug screening and confirmation testing. DCF shall solicit competitive bids for drug screening and confirmatory screening services to ensure the lowest costs. The cost of screening and confirmatory testing shall be paid by the individual applicant.
- DCF shall provide any individual who tests positive for drugs with information concerning drug abuse and treatment programs in the area in which he or she resides. The bill specifies that neither DCF nor the state is responsible for providing or paying for substance abuse treatment as part of screening under this section.
- DCF is required to submit an annual report to the Speaker of the House of Representatives, the President of the Senate and the Governor by January 1, 2013.

The bill provides an effective date of July 1, 2011.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### *Temporary Assistance for Needy Families (TANF)*

Under the welfare reform legislation of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act – PWRORA – Public Law 104-193, the Temporary Assistance for Needy Families (TANF) program replaced the welfare programs known as Aid to Families with Dependent Children (AFDC), the Job Opportunities and Basic Skills Training (JOBS) program and the Emergency Assistance (EA) program. The law ended federal entitlement to assistance and instead created TANF as a block grant that provides States, territories and tribes federal funds each year. These funds cover benefits, administrative expenses, and services targeted to needy families. TANF became effective July 1, 1997, and was reauthorized in February 2006 under the Deficit Reduction Act of 2005.<sup>1</sup> States receive block grants to operate their individual programs and to accomplish the goals of the TANF program. Those goals include:

- Assisting needy families so that children can be cared for in their homes;
- Reducing the dependency of needy parents by promoting job preparation, work and marriage;
- Preventing out-of-wedlock pregnancies;
- Encouraging the formation and maintenance of two-parent families.<sup>2</sup>

Currently, DCF administers the TANF program in conjunction with the Agency for Workforce Innovation (AWI). Current law provides that families are eligible for cash assistance for a lifetime cumulative total of 48 months (4 years).<sup>3</sup> DCF reports that approximately 113,346 people are receiving temporary cash assistance.<sup>4</sup> The FY 2010-2011 appropriation of TANF funds to support temporary cash assistance was \$211,115,965.

The TANF program expires on September 30, 2011 and must be reauthorized by Congress to continue the program.

##### *Food Assistance Program (Supplemental Nutrition Assistance Program-SNAP)*

The Food Assistance Program is a 100 % federally funded program to help low-income people buy food they need for good health. The U.S. Department of Agriculture (USDA) determines the amount of food assistance benefits an individual or family receives. Food assistance benefits are a supplement to a family's food budget. Households may need to spend some of their own cash, along with their food assistance benefits, to buy enough food for a month.<sup>5</sup> DCF reports that over 1.9 million Floridians received food assistance during fiscal year 2009-10.<sup>6</sup>

##### *Pilot Project for Drug Testing TANF Applicants*

From January 1999 to May 2001, DCF in consultation with Workforce Florida implemented a pilot project in Regions 3 and 8 to drug screen and drug test applicants for TANF.<sup>7</sup> A Florida State University researcher under contract to evaluate the pilot program did not recommend continuation or statewide expansion of the project. Overall research and findings concluded that there is very little

---

<sup>1</sup> US Dept. of Health and Human Services, Administration on Children and Families <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited on 2/15/11)

<sup>2</sup> *Id*

<sup>3</sup> s. 414.105, F.S.

<sup>4</sup> DCF Quick Facts, Access Program, January 1, 2011.

<sup>5</sup> Food Assistance Program Fact Sheet, DCF <http://www.dcf.state.fl.us/programs/access/foodstamps.shtml> (last visited 3/3/11)

<sup>6</sup> DCF Quick Facts, Access Program, January 1, 2011

<sup>7</sup> Evaluation Report, Robert E.Crew, Florida State University (on file with committee staff).

difference in employment and earnings between those who test positive versus those who test negative. Researchers concluded that the cost of the pilot program was not warranted.

### *Sanctions to Welfare and Food Assistance Recipients from Felony Drug Convictions.*

Federal law provides that an individual convicted (under federal or state law) of any offense which is classified as a felony related to the possession, use or distribution of a controlled substance shall not be eligible for assistance under the TANF program or benefits under the food stamp program or any program carried out under the Food and Nutrition Act of 2008.<sup>8</sup>

The same section of Federal law provides that each state has the right to exempt individuals from having benefits withheld due to a felony drug charge.<sup>9</sup> Florida has opted to exempt individuals from this provision and does not deny benefits for a felony drug conviction, unless the conviction is for drug trafficking.<sup>10</sup>

### *Drug Testing Welfare and Food Assistance Recipients*

Federal law regarding the use of TANF funds provides that states may test welfare recipients for use of controlled substances and sanction those recipients who test positive.<sup>11</sup> However, there is no provision in federal law allowing drug testing recipients of the food assistance program. Further the Federal code provides that states cannot as a condition of eligibility impose additional application or application processing requirements, on recipients of the food assistance program.<sup>12</sup>

### *Protective Payees*

The TANF program requires that people receiving cash assistance must satisfy work requirements established in federal law. Florida statutes provide that the Agency for Workforce Innovation develop specific activities that satisfy the work requirements.<sup>13</sup>

In the event that a TANF recipient is noncompliant with the work activity requirements, DCF has authority to terminate cash assistance to the family.<sup>14</sup> In the event that assistance is terminated, DCF will establish a protective payee that will receive TANF funds on behalf of any children in the home who are under the age of 16.<sup>15</sup> The protective payee shall be designated by DCF and may include:<sup>16</sup>

- A relative or other individual who is interested in or concerned with the welfare of the child or children and agrees in writing to utilize the assistance in the best interest of the child or children.
- A member of the community affiliated with a religious, community, neighborhood, or charitable organization who agrees in writing to utilize the assistance in the best interest of the child or children.
- A volunteer or member of an organization who agrees in writing to fulfill the role of protective payee and utilize the assistance in the best interest of the child or children.

### *Present Testing of Offenders on Community Supervision*

In Florida, offenders convicted of certain non-violent felonies who are chronic substance abusers may be placed by the courts on community supervision with the Department of Corrections (DOC); the program includes random drug testing.<sup>17</sup> Those placed on drug offender probation serve an average sentence of 2.9 years. According to DOC statistics, during 2009-2010 there were 40,851 people on community supervision due to a drug offense. This includes offenders sentenced to specialized drug

---

<sup>8</sup> P.L. 104-193, Section 115, 21 U.S.C. 862(a)

<sup>9</sup> *Id*

<sup>10</sup> s. 414.095, F.S.

<sup>11</sup> P.L. 104-193, Section 902, 21 U.S.C. 862(b)

<sup>12</sup> 7 CFR Part 273.2

<sup>13</sup> s. 445.024, F.S.

<sup>14</sup> s. 414.065, F.S.

<sup>15</sup> *Id*

<sup>16</sup> *Id*

<sup>17</sup> s. 948.20, F.S.

offender probation in addition to those who committed a drug offense but were not sentenced to drug probation.<sup>18</sup>

### *Challenges under the U.S. Constitution*

The courts have found in some cases that suspicion-less drug testing is constitutional and does not violate the Fourth Amendment, which protects an individual's rights against unreasonable search and seizure.<sup>19</sup>

However, in 1999 the State of Michigan enacted a pilot program for suspicion-less drug testing of all family assistance recipients with the intent for the program eventually to become effective statewide.<sup>20</sup> Welfare recipients challenged the new law authorizing suspicion-less drug testing in federal court. The federal district court found that the law was an unconstitutional violation of individual's right to privacy under the Fourth Amendment. The court specifically ruled that drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use.<sup>21</sup>

### *Agency for Health Care Administration – Laboratory Certifications*

The Agency for Health Care Administration (AHCA) regulates facilities that perform clinical, anatomic, or cytology lab services to provide information or materials for use in diagnosis, prevention or treatment of a disease or in the identification or assessment of a medical or physical condition in accordance with Chapter 408 and 483, F.S. These are considered clinical labs. Additionally, AHCA regulates facilities for "Drug Free Workplaces." These types of labs perform chemical, biological or physical instrumental analyses to determine the presence or absence of specified drugs or their metabolites in job applicants of any agency in state government.<sup>22</sup> AHCA does not have the authority to drug screen temporary cash assistance benefits in either type of lab.

### *Department of Health and Human Services Division of Workplace Programs*

The United States Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA), Division of Workplace Programs (DWP), provides oversight for the Federal Drug Free Workplace Program. DWP certifies labs that conduct forensic drug testing for federal agencies and for some federally-regulated industries.<sup>23</sup>

### *Agency Rulemaking*

DCF must comply with the statutory requirements for rulemaking when implementing or interpreting a substantive statute.<sup>24</sup> Exercising rulemaking authority delegated by the Legislature requires the authority to adopt rules and sufficient statutory guidance to implement a specific statute.<sup>25</sup>

### **Effect of Proposed Changes**

The bill creates s. 414.0652, F.S., establishing that DCF will create a drug screening program that requires individuals to consent to being drug screened as a condition of eligibility for temporary cash assistance. DCF shall provide notice for the potential of drug screening to all applicants and recipients

---

<sup>18</sup> "2009-2010 Agency Statistics" at [http://www.dc.state.fl.us/pub/annual/0910/stats/csp\\_population.html](http://www.dc.state.fl.us/pub/annual/0910/stats/csp_population.html)

<sup>19</sup> Board of Education v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002); Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

<sup>20</sup> P.A. 1999, No. 17, codified as s. 400.571, Michigan Compiled Statutes Annotated.

<sup>21</sup> Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E. D. Mich. 2000). On appeal a panel of the Sixth Circuit first reversed the District Court, finding the required testing did not violate the Fourth Amendment to the U.S. Constitution. Marchwinski v. Howard, 309 F. 3d 330 (6<sup>th</sup> Cir. 2002). That decision was vacated for the entire court to consider the case. Marchwinski, vacated 319 F. 3d 258. The appellate court deadlocked 6-6 to reverse so the lower court decision stood affirmed. Marchwinski, affirmed after rehearing *en banc*, 60 Fed. Appx. 601, 2003 WL 1870916 (6<sup>th</sup> Cir. 2003).

<sup>22</sup> Chapter 408, F.S.

<sup>23</sup> *Id*

<sup>24</sup> S. 120.54, F.S.

<sup>25</sup> S. 120.536(1), F.S. Sloban v. Florida Board of Pharmacy, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

and shall require each person to sign an acknowledgement form that he/she has received notice of DCF's drug screen policy and that he/she can refuse to undergo the screen.

### *Drug Screening Process*

Individuals will only be screened if they have been convicted of a drug felony within the prior 3 years, and will continue to be screened annually for 3 years after they begin to receive TANF funds. Currently, DCF does not drug screen any individual as a condition of eligibility for cash assistance. DCF estimates that between 170-340 people (based on current caseloads) would test positive as a result of a drug screen, and that about 1.7% of current recipients would have a prior drug felony conviction.<sup>26</sup>

The bill provides that an individual will be disqualified from receiving or continuing to receive TANF benefits if:

- They refuse to submit to a drug screen or confirmatory test under this section.
- They test positive for drugs as a result of a confirmation test.

In the event that an individual fails a confirmation test they will be ineligible for TANF benefits for 3 years. The bill establishes DCF may designate a statutory "protective payee" to receive funds on behalf of the minor child or children in a family with a member disqualified under this section. The protective payee may not have been convicted of a drug felony within the past 3 years. After the 3 year ineligibility period, a disqualified individual may reapply but would be required to submit to drug testing if convicted of a drug-related felony in that 3 year period.

DCF shall provide an individual who tests positive for drugs information concerning substance abuse treatment programs that may be available in their area. Neither DCF nor the state is responsible for providing or paying for substance abuse treatment for these individuals as part of the screening conducted in this section of law.

Applicants for cash assistance shall be responsible for the cost of both the initial drug screen and the confirmatory test (if needed). DCF shall solicit competitive bids for drug screening and confirmatory testing to ensure the lowest possible cost. DCF estimates the initial screening cost at \$10 per person and the confirmatory test at \$25 per person.<sup>27</sup>

DCF is required to approve the testing laboratories, establish standards for drug screening and testing, and develop applicable protocols, policies, and procedures. Approved labs must agree to defend the results and conclusions in appeal hearings, as described in s. 409.285. The bill provides DCF with general rulemaking authority but does not provide further guidance on developing required standards, policies, protocols, or procedures.

The bill modifies language from s. 414.095, F.S., establishing that benefits shall not be denied to food assistance recipients unless they are convicted of drug trafficking pursuant to s. 893.135, F.S.

### *Definitions*

The bill provides definitions for the following:

- Applicants or recipients
- Confirmation Test or Confirmatory Testing
- Drug
- Drug Screening or Screen
- Initial Drug Screening or Initial Screen
- Nonprescription Medication
- Prescription Medication

---

<sup>26</sup> Email from Jennifer Lange on TANF (on file with committee staff). Numbers and Statistics based on data from North Carolina, DCF has been in exchanges with the state as it relates to the bill and numbers of people affected.

<sup>27</sup> Per DCF bill analysis, 2/8/2011 (on file with committee staff).

- Specimen

### *Specimen Collection*

The bill details the use of results from specimen collection, requiring:

- That the individual to be screened or tested must provide written consent to be screened or tested on a form developed by DCF.
- A specimen shall be collected with due regard to the privacy of the individual providing the specimen and in a manner to prevent substitution or contamination of the specimen.

Specimen collection must be documented and should adhere to the following procedures:

- Labeling of specimen containers to preclude erroneous identification of drug screen or confirmation results.
- A form on which the individual being tested can provide any information that he/she feels is relevant to the screen, including prescription or non-prescription medications that are currently or were recently used. The form must provide notice of the most common medications by brand name or common name and by chemical name which may alter or affect a drug screen or confirmation test.

Specimen collection, storage and transportation to the testing site must be performed in a manner that reasonably precludes contamination of the specimen, according to policies and procedures which DCF is to adopt. Additionally, the specimen that produces a positive screen or positive test result must be preserved for a certain period of time to be established by the department's policies and procedures.

### *Mandated Report*

The bill requires DCF to submit a report detailing statistics from the program to the Governor, President of the Senate and Speaker of the House by January 1, 2013.

### B. SECTION DIRECTORY:

**Section 1:** Creates s. 414.0652, F.S., relating to drug screening.

**Section 2:** Amends s. 414.095, F.S., related to determining eligibility for temporary cash assistance.

**Section 3:** Provides an effective date of July 1, 2011.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None. The bill authorizes no new revenue sources and existing revenues would not be increased by implementation of the program.

#### 2. Expenditures:

Indeterminate but insignificant. DCF may incur some cost to implement and execute the program but the primary testing costs will be borne by applicants and recipients subject to testing.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill authorizes no new revenue sources and existing revenues would not be increased.

#### 2. Expenditures:

The bill requires no expenditures by local governments.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have an impact on applicants who are required to undergo a drug screen or confirmation test as a condition of eligibility for temporary cash assistance funds. DCF estimates that the initial drug screen costs will be \$10.00 per person and the confirmatory test will be \$25.00 per person.<sup>28</sup> However, exact costs will not be known until DCF solicits competitive bids from private laboratories. Private laboratories performing testing services will receive the fees paid by program applicants and recipients.

C. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

U.S. Constitution

As discussed above, under certain circumstances the U.S. Supreme Court found suspicion-less drug testing is constitutional and does not violate the Fourth Amendment.<sup>29</sup> However, in the only reported case addressing suspicion-less drug testing of all family assistance recipients the court ruled drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use.

The current bill as drafted does not conduct universal or random drug testing. In addition, the testing is limited to individuals with prior drug related felony convictions in the past 3 years.

Florida Constitution

The Florida Constitution guarantees every natural person’s right to be let alone and free of governmental intrusion into their private life except as the Constitution otherwise provides.<sup>30</sup> In the context of medical treatment, this has been judicially interpreted as requiring a compelling state interest sufficient enough to overcome the constitutional right.<sup>31</sup> This right has not been interpreted in the context of drug testing as a condition of eligibility for TANF.

Providing rulemaking authority without sufficient direction has been found to be an invalid delegation of legislative power in violation of the Florida constitutional separation of powers.<sup>32</sup>

B. RULE-MAKING AUTHORITY:

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>33</sup> Rulemaking authority is delegated by the Legislature<sup>34</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>35</sup> a rule.

<sup>28</sup> DCF Bill Analysis on HB 353 (2/8/2011)

<sup>29</sup> See note 19, above.

<sup>30</sup> Art. I, §23, Fla. Const.

<sup>31</sup> *Burton v. State*, 49 So.3d 263, 265 (Fla. 1<sup>st</sup> DCA 2010).

<sup>32</sup> Art. II, §3, Fla. Const.; *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>33</sup> S. 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

The bill provides general rule making authority is to DCF but is not sufficient to fully implement the drug screening program. The following delegations are made without specific standards and guidelines to preclude DCF from exercising unbridled discretion in creating policy or applying the law:

- Selecting and approving testing laboratories.
- Approving a method of initial screening which is scientifically accepted and more accurate than an immunoassay procedure or its equivalent.
- Establish standards for drug screening and testing by approved laboratories.
- Developing drug-screening and confirmatory-testing protocols, policies, and procedures.

Existing statutes applicable to individual drug testing in other areas may provide sufficient guidance for this program if expressly referenced or incorporated into proposed s. 414.0652.<sup>36</sup>

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

1. The bill states that neither the department nor the state is responsible for paying for substance abuse treatment for individuals as part of the screening conducted in this section. This could create problems for DCF in determining the individuals who failed TANF drug screening and are now seeking help at a DCF licensed substance abuse treatment facility or provider. It appears that DCF would need to establish a system to cross reference those denied temporary cash assistance due to drug screening with those who are seeking substance abuse treatment.
2. If the cost of drug testing is too expensive for applicable TANF applicants, it could become a deterrent for people applying to get cash assistance.
3. The last sentence of the definition of "specimen", lines 87-88, states "a urine specimen shall be collected and analyzed for all initial drug screens and confirmation tests under this section." This sentence is more related to policy than the definition of specimen. This should be moved to (5) "Use of Results."
4. The bill is silent on how, when, and to whom the testing results are reported.
5. The bill does not address whether test results submitted to DCF are exempt from disclosure under Ch. 119, F.S., the Florida Public Records Act. Results of mandatory drug testing are exempt from disclosure under the applicable substantive statutes for workplace drug testing,<sup>37</sup> workers compensation records held by the Florida Self-Insurers Guaranty Association, Inc.,<sup>38</sup> and unemployment compensation records which could disclose the identity of an employer or employee.<sup>39</sup> Without a specific exemption the drug testing results held by DCF are public records subject to disclosure.<sup>40</sup>
6. Because this pertains to personal health information, federal law may control the disclosure of the test results.<sup>41</sup>

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

---

<sup>34</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>35</sup> S. 120.52(17).

<sup>36</sup> Standards established under s. 112.0455, the Drug Free Workplace Act, may provide the guidance necessary for proper rulemaking, particularly the following subsections: 112.0455(5), (8), (11), (12), and (13).

<sup>37</sup> S. 112.0455(11), F.S.; s. 440.102, F.S.

<sup>38</sup> S. 440.3851(1), F.S.

<sup>39</sup> S. 443.1715(1), F.S.

<sup>40</sup> Ss. 119.01(1) & 119.07(1), F.S.

<sup>41</sup> Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.